

Decision 04-05-034 May 27, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Lodi Gas Storage, L.L.C. for a Certificate of Public Convenience and Necessity for Construction and Operation of Gas Storage Facilities.

Application 98-11-012
(Filed November 5, 1998;
reopened July 10, 2003)

**OPINION ON LODI GAS STORAGE, L.L.C.'S PETITION
FOR MODIFICATION OF DECISION 00-05-048**

I. Summary

This decision grants Lodi Gas Storage L.L.C.'s (LGS) petition for modification of Decision (D.) 00-05-048 insofar as it changes the amount of the surety bond condition of its certificate of public convenience and necessity (CPCN) from \$20 million to \$10 million, adjusted annually for inflation from the date of issuance of D.00-05-048, May 18, 2000. However, the decision denies LGS' request to eliminate the surety bond condition in its entirety.

II. LGS' Petition for Modification

On July 10, 2003, LGS filed its petition, seeking to eliminate the \$20 million surety bond condition. The grounds for LGS' petition are summarized as follows:

- Given the completed construction of the Lodi facility and LGS' operating experience to date, there is no public purpose served by the \$20 million surety bond condition;

- Based on discussions with local community members, there is either support for or no opposition to LGS' request to eliminate the \$20 million surety bond condition;
- The \$20 million surety bond condition is discriminatory and imposes an economic hardship undermining the Commission's policy of fostering the development of competitive natural gas storage services; and
- LGS currently is strong financially.

In support of its petition, LGS attached under seal its most current financial statement as well as a statement of support for LGS' request from an ad-hoc committee of local landowners that previously supported LGS' request for its CPCN.

The California Farm Bureau Federation and the San Joaquin Farm Bureau Federation (Farm Bureau), Reclamation District No. 563 (Reclamation District), and Todd and Maureen Williams (Williams) oppose LGS' petition.¹ These parties argue that the Commission found it necessary to require the bond as part of LGS' CPCN in order to mitigate legitimate community concerns about the operations and future termination of the gas storage facility. Accordingly, those concerns are valid until all the CPCN conditions are satisfied following the termination of the project.

¹ Additionally, two members of the State Assembly (from the project area) and the Chairman of the Board of Supervisors of San Joaquin County sent letters supporting the petition. About four landowners or residents of the project areas sent letters opposing the petition.

III. Discussion

The principal issue we address is whether it is appropriate to modify D.00-05-048 to eliminate the \$20 million surety bond condition. Before addressing this main issue, we address the procedural propriety of considering this petition which was filed over a year after the Commission issued the decision which LGS requests be modified.

A. Rule 47

Rule 47(d) of the Commission's Rules of Practice and Procedure provides that a petition for modification must be filed and served within one year of the effective date of the decision proposed to be modified. If more than one year has elapsed, the petition must also explain why it could not have been presented within the one-year timeframe. If the Commission determines that the late submission is not justified, it may on that ground issue a summary denial of the petition.

Here, LGS filed the petition on July 10, 2003, a little over three years after D.00-04-048 issued. LGS argues that it waited to present this petition until construction of the project and initial operation occurred, so that the Commission could better assess the need for the bond in light of these events. We find this rationale sufficient and address the petition on its merits.

B. History of the Surety Bond Condition

At the evidentiary and public participation hearings which preceded the issuance of the proposed decision on LGS' CPCN in 2000, there was extensive public opposition to the Commission granting LGS a CPCN. The Administrative Law Judge's (ALJ) proposed decision, issued on March 2, 2000, found that a confluence of factors required denial of LGS' application, in the exercise of the Commission's discretion to weigh the factors set out in Pub. Util. Code § 1002

(particularly the requirement that the Commission consider community values),² against the need for the project.

On May 4, 2000, Commissioners Lynch and Duque issued an alternate proposed decision (alternate draft) which conditionally granted the CPCN. The alternate stated that the Commission could mitigate community concerns with several conditions so that, in balancing the community values with the other criteria set forth in § 1002, the general need for and benefits of competitive gas storage facilities in California, and the outcome of the Environmental Impact Report, the Commission could conditionally approve the application. (Alternate draft at 31-32.)

One condition the alternate draft imposed was that LGS provide a surety or performance bond in the amount of \$30 million to cover the costs of meeting its obligations under the CPCN. According to the alternate draft, these costs include, but are not limited to, reburial of the pipeline in the event of subsidence of the soil covering the pipeline, costs of restoring the area in the event of abandonment or bankruptcy, etc. The alternate draft required the surety or performance bond to remain in effect until one year following the termination of project operations. (*Id.*)

² Under Pub. Util. Code § 1002, the Commission must consider the following factors in determining whether to grant a CPCN: (1) community values; (2) recreational and park areas; (3) historical and aesthetic values; and (4) influence on the environment.

The obligation to consider the factors listed in § 1002 is independent of the Commission's California Environmental Quality Act (CEQA) obligation. In addition to CEQA obligations, Pub. Util. Code § 1002 provides the Commission "with responsibility independent of CEQA to include environmental influences and community values in our consideration of a request for a CPCN." (See *Re Southern California Edison Company*, D.90-09-059, 37 CPUC2d 413, 453.)

In its comments to the alternate draft dated May 11, 2000, LGS stated that it accepted the concept of the bonding requirement, but believed that the bond amount was too high. LGS recommended that the cost of the surety bond be reduced to \$10 million, adjusted annually for inflation, arguing that this reduced amount was sufficient for pipeline reburial and removal, and site restoration.³

In D.00-05-048, the Commission retained the surety bond condition but reduced the amount to \$20 million. The Commission did not require the \$20 million to be adjusted annually for inflation. Ordering Paragraph 3 required LGS to file a written acceptance of the CPCN within 60 days of the effective date

³ LGS “also accepts the concept of the bonding requirements, but as will be explained below, believes they are far too high.

“Of the entire length of the pipeline, it seems likely that only half would ever require removal with accompanying restoration of surface property. The pipeline on Staten Island will be under the permanent levee to be built under the settlement agreement with Pacific Realty Associates and will never need to be removed. In three other areas, the pipeline will not interfere with agricultural operations and in fact removal of the pipeline would be more disruptive than abandonment in place. These three areas are the portion along country roads, the area where the pipeline will parallel the Woodbridge Irrigation District, and the portion of the pipeline on the Brannan Island State Park. LGS has been investigating the cost of removing project features where such removal would be required, including the pipeline and the compressor and separation facilities. LGS estimates that the cost of such removal would be in the neighborhood of \$8 million.

“Taking this into account, as well as the concern stated in the AD [alternate draft] over the possible need to rebury pipeline if it becomes exposed, LGS suggests that a bond in the amount of \$10 million would be more than adequate to meet the concerns expressed in the AD. LGS suggests that the AD require a bond of \$10 million, to be adjusted annually for inflation.” (LGS’ May 11, 2000 comments at 8-9.)

of the decision. On June 30, 2000, LGS timely filed a written acceptance of the CPCN granted by D.00-05-048.

C. It is Reasonable to Lower, But Not to Eliminate, the Amount of the Surety Bond

The Commission imposed a condition to the CPCN that LGS provide a surety or performance bond in the amount of \$20 million in order for LGS to “cover the costs of meeting its obligation under the CPCN. These costs include, but are not limited to, reburial of the pipeline in the event of subsidence of the soil covering the pipeline, costs of restoring the area in the event of abandonment or bankruptcy, etc. The surety or performance bond shall remain in effect until one year following the termination of project operations.” (D.00-05-048, 2000 Cal. PUC LEXIS 394 *51.)

The history of the surety bond condition demonstrates that acceptance of this condition was integral to LGS receiving its CPCN. The ALJ’s proposed decision denied the CPCN after weighing the need for the project against the criteria set forth in § 1002. The alternate draft granted the CPCN after conditioning approval, among other conditions, on the surety bond condition in order to mitigate community concerns. The alternate draft initially proposed a \$30 million surety bond, but in response to comments from LGS that it accepted the concept of a bond requirement but disputed its amount, lowered the bond amount to \$20 million.

LGS argues that the rationale for establishing the surety bond no longer exists. According to LGS, the principal rationale for the bond was to address the risks that LGS would fail to complete construction, to make the infrastructure operational, or attract customers. LGS argues that construction is now complete, the facility is operational, LGS has retained a significant base of customers, and

the company has successfully attracted a long-term investor pursuant to D.03-02-071. Because of these facts, LGS believes that the bond is no longer necessary.

We disagree. As stated above, the surety bond condition was imposed to cover all of LGS' costs of meeting its obligation under the CPCN. According to D.00-05-048, these costs include, but are not limited to, reburial of the pipeline in the event of subsidence of the soil covering the pipeline and the costs of restoring the area in the event of abandonment or bankruptcy. Soil subsidence can occur at any time, as can the cost of restoring the area in the event of abandonment or bankruptcy.

In the record which led to the issuance of D.00-05-048, LGS itself admitted that a surety bond of \$10 million, as adjusted for inflation, is a reasonable amount to cover LGS' costs in the event reburial of the pipeline becomes necessary and to restore the area in the event of abandonment or bankruptcy. Thus, it is still necessary to retain the surety bond condition. However, it is reasonable to reduce the amount of the bond to \$10 million, adjusted annually for inflation from the date of issuance of D.00-05-048, May 18, 2000, in order to take into account LGS' progress on the gas storage facility since the issuance of D.00-05-048.

According to LGS, the surety bond condition should be eliminated because the salvage value of the above-ground equipment and the relatively low cost of securing the underground pipelines is sufficient protection for the community. In its petition, LGS did not demonstrate the salvage value of its equipment, nor did LGS demonstrate any error of its earlier admission that a \$10 million surety bond is an appropriate bond level for pipeline reburial and removal, and site restoration. Furthermore, equipment can be saddled with

liens, and the proceeds from equipment salvage can be used for other purposes. LGS has not demonstrated that this option is an adequate substitute for the surety bond condition.

LGS argues that the likelihood that the project might be abandoned or face bankruptcy in the future is remote given the value of the facility to the California energy market, and LGS' financial position, which LGS states has been strengthened as a result of an investor. When we approved the change of control of LGS in D.03-02-071, we conditioned this approval on LGS continuing to be bound by the terms of its CPCN. Specifically, in Ordering Paragraph 3(a), we required LGS to provide clear representation in writing, prior to the change of control, that the bonding entities will continue to bond LGS and the Lodi Facility under the \$20 million bond. Furthermore, companies larger than LGS have had financial difficulties and have applied for bankruptcy protection. Thus, we do not eliminate the bond requirement on these grounds.

LGS states that based on its discussion with local community members, there is either support for or no opposition to LGS' request to eliminate this condition. However, this is not the case. The Farm Bureau, Reclamation District, and Williams, have also voiced thoughtful opposition to LGS' request. Thus, circumstances regarding community support have not changed since the issuance of D.00-05-048 since the community is divided on this issue.

LGS also alleges that the surety bond condition is discriminatory because Wild Goose and Pacific Gas and Electric Company (PG&E) do not have this condition as part of their CPCNs. The Commission places conditions upon the granting of CPCNs according to the needs of the individual case. Here, based on the unique circumstances of LGS' facility, we determined certain conditions were required in order to issue the CPCN. LGS accepted those

conditions with full knowledge of the conditions we previously imposed on Wild Goose and PG&E. LGS was also aware that it would be operating in a competitive market and that the surety bond is to remain in effect until one year following the termination of project operations. Thus, we decline to grant affirmative relief on these grounds.

However, based on our prior discussion, we modify D.00-05-048 as set forth more fully in the ordering paragraphs to reduce the amount of the surety bond from \$20 million to \$10 million, adjusted annually for inflation from the date of issuance of D.00-05-048, May 18, 2000.⁴

IV. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. LGS and the Farm Bureau filed timely comments and replies. We add a footnote at the conclusion of the discussion in response to comments, but make no substantive changes to the draft decision.

V. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Janet A. Econome is the assigned ALJ in this proceeding.

⁴ In its comments to the draft decision, the Farm Bureau urges the Commission to condition this decision on LGS ending any further attempts to modify or terminate the surety bond requirement. We do not adopt this condition. However, if at a future date no less than a year from the effective date of this decision, LGS were to consider filing a petition for modification regarding the surety bond requirement, we would urge LGS to meet first with the local community, and particularly those individuals who have responded to this petition, in order to reach a mutually agreeable outcome on an alternative or modification to the bond requirement.

Findings of Fact

1. LGS waited to present this petition for modification until construction of the project and initial operation occurred, so that the Commission could better assess the need for the bond in light of these events.
2. The history of the surety bond condition demonstrates that acceptance of this condition was integral to LGS receiving its CPCN.
3. The surety bond condition was imposed to cover all of LGS' costs of meeting its obligation under the CPCN. According to D.00-05-048, these costs include, but are not limited to, reburial of the pipeline in the event of subsidence of the soil covering the pipeline and the costs of restoring the area in the event of abandonment or bankruptcy. Soil subsidence can occur at any time, as can the cost of restoring the area in the event of abandonment or bankruptcy.
4. In the record which led to the issuance of D.00-05-048, LGS itself admitted that a surety bond of \$10 million, as adjusted for inflation, is a reasonable amount to cover LGS' costs in the event reburial of the pipeline becomes necessary and to restore the area in the event of abandonment or bankruptcy.

Conclusions of Law

1. LGS has presented sufficient rationale pursuant to Rule 47(d) of the Commission's Rules of Practice and Procedure for the Commission to consider this petition for modification more than one year after the issuance of the decision sought to be modified.
2. It is reasonable to retain the surety bond condition in order to ensure LGS' costs are covered in the event reburial of the pipeline becomes necessary and to restore the project area in the event of abandonment or bankruptcy. However, the amount of the surety bond should be reduced to \$10 million, adjusted annually for inflation from the date of issuance of D.00-05-048, May 18, 2000.

3. LGS' July 10, 2003 Petition for Modification should be granted to the extent set forth in the Ordering Paragraphs of this decision.

4. This decision should be effective immediately so that LGS may reduce the amount of its surety bond.

O R D E R

IT IS ORDERED that:

1. Lodi Gas Storage, L.L.C.'s (LGS) Petition for Modification of Decision (D.) 00-05-048, dated July 10, 2003, is granted to the extent set forth below.

2. D.00-05-048 is modified as follows:

- The fourth sentence of the first full paragraph on page 35 is modified as follows: "Furthermore, LGS is also required to provide a surety or performance bond in the amount of \$10 million, adjusted annually for inflation from the date of issuance of D.00-05-048, May 18, 2000, to cover the costs of meeting LGS' obligations under this CPCN."
- The first bullet in the second full paragraph on page 67 is modified as follows: "We adjust the amount of the required surety or performance bond to \$10 million, adjusted annually for inflation from the date of issuance of D.00-05-048, May 18, 2000."
- The second sentence of Conclusion of Law 7 on page 76 is modified as follows: "Furthermore, LGS should also provide a surety or performance bond in the amount of \$10 million, adjusted annually for inflation from the date of issuance of D.00-05-048, May 18, 2000, to cover the costs of meeting LGS' obligations under this CPCN."

- The second sentence of Ordering Paragraph 5 is modified as follows: “Furthermore, LGS shall also provide a surety or performance bond in the amount of \$10 million, adjusted annually for inflation from the date of issuance of Decision 00-05-048, May 18, 2000, to cover the costs of meeting LGS’ obligations under this CPCN.”

3. This proceeding is closed.

This order is effective today.

Dated May 27, 2004, at San Francisco, California.

MICHAEL R. PEEVEY

President

CARL W. WOOD

LORETTA M. LYNCH

GEOFFREY F. BROWN

SUSAN P. KENNEDY

Commissioners